

Elder Law Advisor

Winter 2019

Does a 401(k) count as a resource when applying for long-term care Medicaid?

My brother has an employer-matched 401(k). According to the 401(k) plan terms, he is not able to make withdrawals from it until he is 59 ½ years of age without a penalty. What can be done to prevent the money from being counted as a resource once he reaches age 59 ½?

The penalty for withdrawing money from the 401(k) account before your brother turns 59 ½ does not protect the money in the account from Medicaid. Because your brother has the ability to liquidate the account (less any penalty), the 401(k) does count as his resource. Having said that, your brother does have options to protect the money in the 401(k). Keep in mind that these are general options and may not apply to your brother's specific situation.

Your brother can spend the money in the 401(k) in a variety of ways. He can go on vacation, make home repairs, buy a new car, or even purchase funeral insurance. What your brother cannot do is give the money away. Any gift he makes will need to be reported when applying for Medicaid for five years (i.e., the five year look back period).

If he doesn't want to spend the money now, he may be eligible to transfer the money to a special needs trust. Transferring the money to a special needs trust is not a gift that will disqualify him for Medicaid benefits. However, the trust must require that any money remaining after your brother's death first reimburses the state for any Medicaid benefits paid for him. This "pay back" provision may make a special needs trust undesirable.

Based on your brother's specific situation, there may be other alternatives available to him. He should consult with a qualified Elder Law Attorney. ◆

What should I expect when hiring an elder law attorney?

You should expect at least three things:

- First, the attorney should be able to provide an explanation of the rules related to Medicaid eligibility in a way that allows you to understand the rules, as well as how the rules relate to your particular situation.
- Second, the attorney should explore planning options available to you.
- Third, the attorney should be able to assist you with implementing the plan from start to finish.

In addition, you should look for an experienced attorney who is willing to provide the consultations and services you need for a flat fee to help you control your legal costs and evaluate whether or not the recommended plan makes sense for you and your family. ◆

What do you mean I'm mom's "Agent"?

Some families have clear plans and open communication regarding who will take on various roles and responsibilities when a family member is incapacitated and can't make their own decisions. Each person listed as agent anticipates their role and has a general idea of what is expected of them.

Alternatively, the day may come when you get the phone call that your loved one is in the hospital and you unexpectedly learn you've been nominated to assist with their affairs. Your eyes widen, and you think, "What! You listed me as your agent! What does that mean?!?" Along with the surprise comes certain responsibilities.

As an agent (Attorney-in-Fact, POA), you are a fiduciary. Being a fiduciary means that legally you must manage your family member's money for his or her benefit, not your own. Fiduciaries owe four basic duties to their principal (i.e. Mom): 1) To act in the principal's best interest, 2) To manage the principal's money and property carefully, 3) To keep the principal's money and property separate from your own, and 4) To keep detailed records of your transactions as Agent.

The role of a fiduciary is not to be taken lightly, but it is also not something to be afraid of. At Ruder Ware, we assist agents to successfully, and legally, meet their fiduciary responsibilities while simultaneously helping their family members through tough times. Please contact us if you'd like assistance in your role as an agent.

In addition, the Consumer Financial Protection Bureau provides free guides to assist you when you are appointed as an agent under a financial power of attorney. You can download a copy at <https://www.consumerfinance.gov/consumer-tools/managing-someone-elses-money/>. ◆

Save the Date: 2019 Elder Law Seminars

March 20, 2019 @ Holiday Inn 94 South,
Eau Claire, WI

March 26, 2019 @ Holiday Inn & Suites, Rothschild, WI

April 17, 2019 @ Hotel Marshfield, Marshfield, WI

Visit www.ruderware.com/seminars for details.

2019 Updates

Medicaid Figures for 2019

- The new maximum community spouse resource allowance (CSRA) = \$126,420.
- The maximum monthly maintenance needs allowance = \$2,743.34.
- To calculate divestment penalties, the daily average nursing home private pay rate is \$286.15 per day (\$8,703.73 per month)

Medicare Premiums, Deductibles and Copayments for 2019

- Standard Part B premium = \$135.50/month
- Part B deductible = \$185
- Part A deductible = \$1,364 (up from \$1,340)
- Co-payment for hospital stay days 61-90 = \$341/day (up from \$335)
- Co-payment for hospital stay days 91 and beyond = \$682/day (up from \$670)
- Skilled nursing facility co-payment, days 21-100 = \$170.50/day (up from \$167.50)



Around the State and Nation

Attorneys Aric Burch and Jessica Merkel attended the Wisconsin NAELA Workshop in Wisconsin Dells in January 2019.

Attorney Aric Burch attended the NAELA Summit in Chicago, Illinois in November 2018.

Attorneys Aric Burch and Jessica Merkel recently attended, "Legal Issues of the Aging" and "Planning Trust MSA and SNTs."

Attorney Jessica Merkel attended, "30 Steps to Perfect Probate" in Milwaukee, Wisconsin in December 2018.

Attorney Jessica Merkel attended a seminar hosted by the Wausau Estate Planners Forum titled, "Frequently Asked Questions About Special Needs Trusts," in January 2019.

About the Authors

Attorney Aric Burch



Planning for how you or a loved one will pay for nursing home care can be a daunting task. As an elder law attorney, Aric works with seniors and their loved ones to prepare for possible long-term care needs. His goal is to alleviate stress by helping clients develop a plan to provide for their long-term care needs, while preserving their assets to supplement their quality of life and pass to future generations. His motivation is to find solutions for clients who are preparing for future life transition and care needs or are in need of immediate qualification for medical assistance benefits.

Attorney Jessica Merkel



At Ruder Ware, Jessica provides counsel on the use of irrevocable trusts for asset protection, medical assistance eligibility, and special needs trusts. Jessica engages families by listening, empathizing, and supporting their choices to achieve their goals. In addition, she counsels clients on estate and trust planning, taxation, powers of attorney, probate, and trust administration.

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Elder Law Services offered by Ruder Ware include:

- Nursing home and long-term care planning
- Asset protection
- Gifting and divestment planning
- Medicare and Medicaid benefits
- Insurance analysis (including long-term care insurance)
- Residential housing and other living options
- Planning for individuals with special needs
- Tax planning
- Durable powers of attorney for property and finances
- Health care powers of attorney
- Wills
- Trusts
- Marital property agreements
- Real estate
- Guardianship
- Conservatorship

Elder Law Team

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